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No. 165

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

INTERSTATE ROOFING & SUPPLY COMPANY,
Petitioner,

v.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, HENRY F. SCHRICKER, JAMES GIVENS, AND RICHARD I. JAMES, AS AND CONSTITUTING THE BOARD OF THE DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INTERSTATE ROOFING & SUPPLY COMPANY, *Petitioner,* v. DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, HENRY F. SCHRICKER, JAMES GIVENS, and RICHARD I. JAMES, as and Constituting the Board of the Department of Treasury of the State of Indiana, *Respondents.*	No. ———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Interstate Roofing & Supply Company prays that a writ of certiorari be issued to review the judgment herein of the United States Circuit Court of Appeals for the Seventh Circuit and respectfully shows to this Honorable Court:

OPINION BELOW

The opinion of the lower court (R. 46-51) is reported in 133 F. (2d) 212.

JURISDICTION

The United States Circuit Court of Appeals for the Seventh Circuit affirmed the District Court's judgment for respondents on January 30, 1943 (R. 52). Petitioner filed a timely petition for rehearing (R. 52-59) which was denied on February 17, 1943 (R. 61). A motion by petitioner to recall the mandate and reconsider the decision was denied on June 2, 1943 (R. 69). An order extending the time for filing a petition for certiorari to and including July 16, 1943, was signed by Mr. Justice Murphy on May 3, 1943 (R. 72). This court has jurisdiction under Section 240 (a) of the Judicial Code, as amended, 28 U. S. C. A., Sec. 347 (a).

QUESTIONS PRESENTED

1. Whether petitioner's gross income or a substantial part thereof was from interstate commerce and whether the imposition thereon of the Indiana gross income tax violated the commerce clause, Article I, Section 8 of the Constitution of the United States.

2. Whether all or a substantial part of petitioner's receipts was from sources outside Indiana, and if so, whether the tax did not apply thereto because of the terms of the act and because of the due process clause of the 14th Amendment to the Constitution of the United States.

3. Whether petitioner's receipts prior to April 1, 1937, the effective date of the 1937 amendment of the taxing act, were in any event taxable at the rate of 1% or whether such receipts were taxable only at the rate of ¼ of 1% as being from the "business of * * * compounding or pre-

paring for * * * use, any article or articles, substance or substances, commodity or commodities."

STATEMENT

This action was brought to recover taxes collected by respondents under the Indiana Gross Income Tax Act both as originally enacted in 1933 (Chapter 50, Indiana Acts 1933, Sec. 64-2601, *et seq.*, Burns' Ind. Stats. 1933) and as amended in 1937 (Chapter 117, Indiana Acts 1937, Sec. 64-2601, *et seq.*, Burns' Ind. Stats. 1933, Pocket Sup.). From an adverse judgment in the District Court (R. 30) petitioner appealed to the Circuit Court of Appeals for the Seventh Circuit, with the result above stated.

During 1933 to 1939, inclusive, the periods involved herein, petitioner was an Illinois corporation with its principal place of business in Chicago. It had no place of business in Indiana, but was qualified to do business therein (R. 21). Petitioner was engaged in the business of furnishing asphalt or composition shingles and materials and applying them to roofs and sides of houses and other buildings. Petitioner sent its salesmen from Illinois into Indiana who solicited in Indiana contracts with owners of such structures, which provided for the furnishing and application of the shingles. The contracts were rejected or accepted and approved by petitioner in Chicago (R. 23-25). Petitioner purchased the shingles from jobbers or manufacturers outside Indiana, usually on a delivered price basis, and in nearly all instances petitioner transported the shingles on its trucks to its customers' premises in Indiana and there immediately applied the shingles. Payments of the prices specified in the contracts were made in

practically all cases to petitioner's Chicago office (R. 25). The shingles were not custom manufactured and could have been applied by any person experienced or qualified for doing that particular type of work, but all applications were made by petitioner's trained employees (R. 25-26). Petitioner offered to apportion the tax on the basis of activities within and without Indiana, but respondents refused to apportion on any basis (R. 26-28).

Of petitioner's total receipts, the portion representing materials purchased outside Indiana varied during the years involved between 33.44% and 42.70%; installation labor between 17.85% and 21.76%; selling expense between 18.16% and 22.59%; overhead between 12.41% and 25.80%; and profit between .26% and 15.69% (R. 29).

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals for the Seventh Circuit erred in affirming the judgment of the District Court in favor of respondents.

2. The Circuit Court of Appeals for the Seventh Circuit erred in denying petitioner's motion to recall the mandate and reconsider the decision.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 82 L. Ed. 1365, wherein it was held that the tax involved violates the commerce clause of Article I, Section 8 of the Constitution of the United States "as applied to receipts from interstate sales" because "the tax includes in its measure, without apportion-

ment, receipts derived from activities in interstate commerce"; and because "the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured."

Petitioner's application of the shingles (representing but from 17% to 21% of the price) was only an incident of interstate sales by a non-resident of Indiana to Indiana customers.*

Allied Mills, Inc. v. *Department of Treasury* (No. 669, this term), 87 L. Ed. 514, is not controlling, as there the taxpayer was a resident of Indiana, had factories in Indiana, and the question as stated by the Indiana Supreme Court, 42 N. E. (2d) 34, 35 (advance sheet), was whether "the incidental interstate nature" of the taxpayer's business entitled it to exemption. Here petitioner had no factory or other place of business in Indiana, purchased no shingles in Indiana, and its business was inescapably, not incidentally, interstate in character.

2. The decison below conflicts with the subsequent decision of the Indiana Supreme Court in *Department of Treasury* v. *International Harvester Co.*, 47 N. E. (2d) 150 (advance sheet), and hence with the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 69, 82 L. Ed. 1188. It was held in the *International Harvester* case that receipts by a non-resident from goods manufactured outside Indiana and sold to Indiana customers pursuant to conditional sales

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* *Nemeth* v. *Becker Roofing Co.* (Mo. App.), 151 S. W. (2d) 559, 560-563; *Primrose Petroleum Co.* v. *Allen* (N. C.), 14 S. E. (2d) 402, 403-404; *McCaskey Register Co.* v. *Mann* (Texas), 273 S. W. 1113, 1114-1116; *Webb* v. *Knoxville Glass Co.* (Ky.), 289 S. W. 260.

orders solicited in and accepted outside Indiana were not from Indiana sources. The taxing act does not purport to reach receipts of a non-resident other than receipts from sources within Indiana. Sec. 64-2602, Burns' Ind. Stats. 1933 and Pocket Supp.

Even under the unsound view of the Circuit Court of Appeals in the instant case that because of petitioner's application of shingles, petitioner's contracts with its Indiana customers were not for sales of goods but were "local" contracts, Illinois clearly was the source of that part of petitioner's receipts represented by activities and transactions occurring therein. An analysis of petitioner's receipts was stipulated by the parties, found by the Master, adopted by the District Court, and is summarized above. The concept of source as the activities which produce or result in income is directly applicable. *Jackling* v. *State Tax Commission* (N. M.), 58 P. (2d) 1167; *In re Kansas City Star Co.* (Mo.), 142 S. W. (2d) 1029, 130 A. L. R. 1168. Otherwise the taxing act as applied here violates the due process clause of the 14th Amendment. *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123, 75 L. Ed 879; *Connecticut General Life Insurance Co.* v. *Johnson*, 303 U. S. 47, 82 L. Ed. 673; *Butler Brothers* v. *McColgan*, 315 U. S. 501.

3. If petitioner's receipts were not from sales of goods the decision of the Circuit Court of Appeals conflicts with the decision of the Indiana Supreme Court in *Oster* v. *Department of Treasury*, 219 Ind. 315, 37 N. E. (2d) 528.

Sec. 3 (a) of the original act (Chap. 50, Acts of 1933; Sec. 64-2603, Burns' Ind. Stats. 1933) imposed a tax at the rate of ¼ of 1% upon receipts of the "business of * * *

compounding or preparing for sale, profit, or use any article or articles, substance or substances, commodity or commodities." Respondents have contended heretofore and the Circuit Court of Appeals has decided that petitioner's entire receipts were from the performance of construction contracts in Indiana and were taxable at the 1% rate prescribed by section 3 (f) of the 1933 Act upon receipts from the performance of contracts.

In the *Oster* case the Indiana Supreme Court reversed the lower court's judgment which had been affirmed by the Indiana Appellate Court, 33 N. E. (2d) 799, and rejected the Department of Treasury's contention that performance of a contract not resulting in a sale of goods was subject to the 1% rate imposed by section 3 (f) of the 1933 Act upon receipts from personal services and performance of contracts. The taxpayer was engaged in manufacturing, one of the activities mentioned in section 3 (a), but there were no sales of goods. Hence if there were no sales of goods in the instant case the lower rate applies even though contracts were performed, inasmuch as petitioner was engaged in preparing articles or substances for use.

Petitioner submits that the writ should be granted.

Respectfully submitted,

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